Supreme Court, U.S.
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No. 86-2001

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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WILEY F. KIRKSEY, INDIVIDUALLY And as Superintendent of the Greene County Board of Education; ROBERT HINES, CAROL ZIPPERT, CLARENCE E. OUTLAND, LUTHER WINN JR., QUEEN E. CRAWFORD, Members of the Board of Education.

Petitioners,

v.

COLEMAN WASHINGTON,

Respondent.

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# REPLY BRIEF

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**STATEMENT REGARDING QUESTION PRESENTED**

Respondent Washington's statement of the questions presented misapprehends the issues presented for review.

In Harlow V Fitzgerald, 57 U.S. 800, 102 S.Ct. 2727 (1982) This court held that officials are" shielded from liability for civil damages insofar as their conduct does not clearly violate established statutory or constitutional rights of which a reasonable person would have known." Harlow, at 2739. While petitioners do not concede there was any clear violation of established law, the Petition For Writ of Certiorari does not rest on a claim of qualified immunity. Petitioner's request for review arises from a rule of causation

established by this court in Mt Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), which requires a showing that the alleged injury resulted wrongful conduct; and on a line of cases which held that an intermediary's decision breaks the causal chain and insulates the alleged wrongful actor from liability. Smiddy v. Varney, 665 F.2d 261 (9th Cir.1981) cert. denied 459 U.S. 1829, 103 S.Ct. 65 (1982); Ames v United States, 600 F.2d 183 (8th Cir.1979) and Dellums v. Powell, 184 U.S. App. D.C. 275, 566 F2d 167 (1977) cert. denied 438 U.S. 916, 98 S.Ct. 3146, (1978)

## ARGUMENTS

### A. THE ISSUE PRESENTED IS ONE OF LEGAL SUFFICIENCY

The first issue presented is one of legal sufficiency. In Mt. Healthy, supra, this court noted that a substantial part of the decision not to renew a teacher's contract was due to the exercise of constitutionally protected activity. That fact, held the court, did not necessarily amount to a constitutional violation if the same result would have been reached in the absence of the protected conduct by the teacher. In the instant case, petitioner submits the Mt. Healthy rule of causation should have been applied, but it was not. If the rule were applied respondent could not prove a

constitutional violation.

The rule of causation announced in Mt. Healthy recognizes that there is no such thing as an attempted Constitutional violation. The issue is one of legal sufficiency, not the weight of evidence. In order to prevail, plaintiff must establish that the alleged wrongful act caused the injury. In other words, to establish a constitutional violation the plaintiff must demonstrate that but for the Superintendent's act, Respondent Washington would not have been decertified by the army. Respondent never challenged the decertification by the army, and he did not call the army commander responsible for the decision or any other army personnel. In addition, the Army's decision, as that

of any other administrative agency, is entitled to a presumption of correctness. Respondent Washington never challenged the army's decision and never overcame that presumption.

Petitioner requests the court take special notice that Respondent alleges in his brief (at page 4) that the Army's investigator "determined" Respondent Washington and his fellow officer, be reprimanded. At (page 9) Respondent states the Army had determined to reprimand Washington. Neither allegation is true, and neither is supported in the record. The investigative officer had no authority to make determinations he could only make recommendations. He did recommend that the participants in the fight be reprimanded,(R2-95,96) as opposed to

decertification. The army, however, made no determination prior to the Superintendent's recommendation. This latter recommendation was made in December of 1983 and the Army's first notification of the decision to withdraw Respondent's authorization to teach was made on January 4, 1984 (R3-46). Prior to rendering its decision, the army considered the statement of the investigator, a statement supplied by respondent, the superintendent's recommendation, the action by the Greene County Board and, no doubt, Respondent's entire file.

Given the application of the Mt. Healthy causation rule and the failure of respondent to overcome the presumption of correctness, petitioner has not and cannot establish a

constitutional violation.

Both Mt. Healthy supra, and the instant case involve alleged constitutional violations and both are Section 1983 actions. Nonetheless, Respondent has attempted to distinguish the Mt. Healthy opinion from this case by arguing that Mt. Healthy involved freedom of speech while this case involves a denial of due process. That distinction, however, does not operate to defeat the application of the Mt. Healthy causation rule to this case. The rule was designed to determine the sufficiency of any allegation of a constitutional violation. Respondent has cited Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737 (1954) in support of his argument on this issue, but that case does not appear to be relevant to any

issue in this case.

**B. ABSENT FRAUD, MISINFORMATION OR UNDUE PRESSURE AN INTERMEDIARY'S INDEPENDENT DECISION BREAKS THE CAUSAL CHAIN.**

The second issue presented for review presents another aspect of causation which frequently arises in 1983 cases. In Smith v. Gonzales 459 U.S. 1005, 103 S. CT. 459 Justice White dissenting from a denial of Writ of Certiorari stated he would grant Certiorari to resolve this significant and recurring question that has divided lower courts.

While the lower courts agree that an intermediary's independent decision breaks the causal chain and insulates an alleged wrongful actor from civil liability, they do not agree on the circumstances within which the rule is to be applied. On the one hand, the

fifth circuit held that an officer cannot be liable even if, by wrongful means, he taints the independent judgment of an intermediary. Smith v. Gonzales, et. al. 670 F.2nd 522 (5th Cir.1982). Other cases, relied upon by petitioner, held generally that an intermediary's independent decision breaks the causal chain and insulates the arresting officer from future liability if, but only if, the officer does not color the intermediary's independent judgment by, for example, exerting pressure or presenting false evidence, Smiddy v. Varney supra at 266-267; where pressure has been equated with the exertion of undue influence, or knowing misstatements Dellums supra; or by withholding of evidence Ames supra. Applying the stricter of the two

foregoing standards to this case: there is no evidence of undue pressure, or of misrepresentation, no evidence that the superintendent withheld information, or that he acted in any way to taint the decision by the army. In the absence of said evidence, the causal chain is clearly broken.

C. CONCLUSION

For the foregoing reasons, this court should grant the Petition for Writ of Certiorari.

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